IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO._____

SOCONY MOBIL OIL COMPANY, INC., SOCIETE ALGERIENNE DES PETROLES MORY, AND TEXACO, INC., *Petitioners*

VERSUS

WALL STREET TRADERS, INC., ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Socony Mobil Oil Company, Inc., Societe Algerienne des Petroles Mory, and Texaco, Inc. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered June 28, 1962.

Citations to Opinions Below

The opinion of the Commissioner is not reported. It will be found at pages 161-240 of the record as printed for the

use of the Court below, nine copies of which are filed herewith. The District Court adopted the Commissioner's findings and conclusions without opinion. The Court of Appeals' opinion is reported at 304 F. 2d 717; it is reproduced in Appendix B to this petition.

Jurisdiction

The basis for federal jurisdiction in the District Court was 28 *U. S. Code,* Sec. 1333 (1).

The judgment of the Court of Appeals was entered on June 28, 1962. A petition for rehearing filed by parties other than petitioners was denied July 26, 1962. The jurisdiction of this Court is invoked under 28 *U. S. Code,* Sec. 1254.

Questions Presented

1. Does a maritime lien arising prior in time to a preferred ship mortgage lose the priority accorded it by the Ship Mortgage Act because the parties to the mortgage have the unrecorded intention that it be a renewal of an earlier mortgage?

2. Can a statutorily required, unqualified and duly recorded release of a prior mortgage, sworn to by the owner as discharged and released, be ignored and held extended by a subsequent mortgage which does not expressly extend the first?

3. Should a ship mortgage bearing a false rate of interest in order to bolster the credit of the mortgagor be preferred to bona fide suppliers' liens?

Statute Involved

The statute involved is the "Ship Mortgage Act, 1920," Act of June 5, 1920, c. 250, Sec. 30, 41 Stat. 1000, as

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amended, 46 *U. S. Code*, Secs. 911 ff.; and in particular, 46 *U. S. Code*, Secs. 922, 925 and 953. The Act is reproduced in **Appendix A** to this petition.

Statement

In 1958, respondent Wall Street Traders, Inc. bought from Empire Commercial Corporation and renewed for one year a $500,000 note and mortgage on SS OZARK.

On various dates in the spring of 1959, petitioners furnished fuel oil to the OZARK. (Socony, April 8, 1959, $12,002.40; Texaco, May 14 and 25, 1959, $7,214.45; Mory, June 2 1959, $18,804.92).

Thereafter, respondent negotiated with the shipowner a new 6 months' mortgage. To the $360,000 balance due on the old mortgage, $50,000 was added, according to respondent's testimony to equalize the debts owed on this and another vessel and to conceal the 16% interest actually being paid behind a 6% facade. Negotiable bonds replaced the former note. These and the mortgage were payable to trustees, not to respondent, as were the prior note and mortgage. The new mortgage was recorded June 27, 1959. Simultaneously, the old mortgage was discharged. The sworn certificate of discharge was absolute. Nothing on the record indicated any intention that the old mortgage be continued in force, or that the new mortgage was intended to be a renewal of the old.

The shipowner paid only $50,000 on the new mortgage, nothing on the bills for fuel oil. Respondent libelled the OZARK, petitioners intervened to assert their liens, and the vessel was sold by the Court.

Since the fund remaining from the sale of the vessel, after payment of costs and other liens of higher priority,

was inadequate to pay both petitioners and respondent, the crucial question was the relative ranking of the claims. The Courts below held that the mortgage had priority and thereby petitioners took nothing.

The reasoning below was that the clear and simple language of 46 *U. S. Code*, Sec. 953 must yield to principles of state mortgage law; that the mortgage, although later in time, should have priority because the parties intended that it be a renewal of the earlier mortgage which predated petitioners' liens. The Courts below so held despite the fact that the earlier mortgage was marked satisfied on the Customs House records, with no indication of such an intention, and that the later mortgage had mortgagees, amount and interest rate all different from those on the earlier mortgage. Further, although at least the Commissioner purported to be following equitable principles, the decision was uninfluenced by the fact that the actual interest rate (16%) was concealed in the later mortgage by increasing the principal to include an amount never in fact loaned to the shipowner and a fictitious (6%) rate substituted, thus giving a false picture of the shipowner's solvency.

Reasons for Granting the Writ

1. The decision below interprets the Ship Mortgage Act in a manner contrary to its plain intent as confirmed by this Court. 46 *U. S. Code*, Sec. 953 is clear and unqualified. In pertinent part, it says that " 'preferred maritime lien' means . . . a lien arising prior in time to the recording and indorsement of a preferred mortgage. . . ." Language so simple needs no interpretation. In *Morse Dry Dock & Repair Co. v. The Northern Star*, 271 U.S. 552 (1926), the sympathy of the lower courts had been aroused because

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neglect of the collector of the port had delayed indorsement of the mortgage until after a repair lien had arisen. This Court held, however, that prior recording alone did not make the mortgage superior to the lien. Mr. Justice Holmes said:

> ". . . (T)he words of the statute seem to us too clear to be escaped. The mortgage is made preferred only upon compliance with all the conditions specified. . . . We see no room for construction, and there is nothing for the courts to do but to bow their heads and obey" (556).

The Act is equally clear as to the effect of the certificate of discharge. 46 *U. S. Code*, Sec. 925(b) provides for the filing of such a certificate only "upon a discharge in whole or in part of the mortgage indebtedness." If the debt is not discharged, a certificate should not be filed. The priority of the old mortgage is then preserved. *The Favorite*, 120 F. 2d 899 (2 Cir. 1941). Clearly, the Act does not allow a mortgagee to inform the world that the debt is discharged and still preserve his priority.

2. The decision below threatens to substitute the confused diversity of state mortgage law for the simple uniformity intended by Congress.

In the decision which immediately preceded and was thought to control this case, the Fifth Circuit had said, "Since the aim [of the Ship Mortgage Act] was to afford as substantial protection to lenders as the peculiar nature of maritime operations would permit, the approach ought to be one of harmony with usual security principles." *Merchants & Marine Bank v. The T. E. Welles*, 289 F. 2d 188, 194 (1961), Appendix B, *infra*. This fundamental

misunderstanding of the Act threatens to permeate all future cases arising under it.

The Act does not indicate that money lenders are to be favored over suppliers whenever state mortgage law would do so. The Congressional plan balances carefully the interests of mortgagees and lienors. It gives ship mortgages maritime status, thus permitting foreclosure in admiralty, and gives properly recorded and indorsed mortgages priority over later liens. Since liens are generally not recorded, it gives the mortgagee further protection by requiring the mortgagor to disclose the existence of any earlier liens (46 *U.S.C.*, Sec. 924), and makes fraudulent concealment both a crime and ground for immediate foreclosure (46 *U.S.C.*, Sec. 941(b)). Thus, when respondent chose to discharge rather than foreclose the earlier mortgage, it knew or with diligence could have ascertained that petitioners' liens had accrued. It was anticipated that any protection required by the mortgagee from later liens would be obtained through insurance. Gilmore & Black, 611; *Merchants & Marine Bank v. The T. E. Welles,* 289 F. 2d 188, 194 fn 11, Appendix B *infra.*

Lienors, on the other hand, are protected as to mortgages only by the record. In determining whether they should foreclose, they can only know what is recorded; they have no power to compel the shipowner to disclose any information, nor in particular that a mortgage satisfied of record was not intended to be discharged but rather to be renewed.

In according mortgagees further rights not granted by Congress, the Court below upset this balance and opened the door to further confusion. As Gilmore and Black point out in *The Law of Admiralty,* there should be uniformity in interpreting the Act, both because of the need for uni-

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formity in maritime law and the need for uniformity in contracts to which the United States is a party, and state chattel mortgage law is "bewilderingly diverse" (pp. 590-2).

3. The decision below is not equitable. If the Act leaves room for interpretation, such interpretation should follow the equitable principles which have historically guided admiralty courts. *Swift & Co. Packers v. Compania Colombiana Del Caribe, S. A.*, 339 U.S. 684, 689-95 (1950). The Act specifically requires that the Customs House record show *inter alia* the amount of the mortgage (46 *U.S.C.*, Sec. 921(b)(5)) and "an affidavit . . . to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel" (46 *U.S.C.*, Sec. 922(a)(3)). As Robinson says in discussing *The R. Lenahan*, 10 F. Supp. 497 (E.D. Pa. 1935), "if it is followed, it will open the ship mortgage transaction to scrutiny clear down to its roots" *(Robinson on Admiralty*, 464).

In the present case, the amount and interest rate of the mortgage as recorded were false—as the Fifth Circuit said, "presumably from an operating point of view to bolster credit." Obviously, a bank contemplating purchase of the mortgage bonds, a supplier contemplating the furnishing of goods on credit (or, as in the case of those in the position of petitioners, a supplier trying to determine whether the ship should be seized to satisfy his lien) could not help but be misled by the representation that the owners of the OZARK were able to obtain a loan at a prime rate. This is not "good faith", and it is not equitable to give preferred status to a mortgagee who has entered into such a device.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: Houston, Texas, September 21, 1962.

Respectfully submitted,

ROBERT EIKEL
Counsel for Petitioner
Socony Mobil Oil Company, Inc.

GEORGE W. RENAUDIN
Counsel for Petitioner
Societe Algerienne des Petroles Mory

L. J. BENCKENSTEIN
Counsel for Petitioner
Texaco, Inc.

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APPENDIX "A"

SHIP MORTGAGE ACT 1920
(as amended)

Chapter 25, Title 46, United States Code

DEFINITIONS

Sec.

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DEFINITIONS

§ 911. *Words and terms used in chapter*

When used in this chapter—

(1) The term "document" includes registry and enrollment and license;

(2) The term "documented" means registered or enrolled or licensed under the laws of the United States, whether permanently or temporarily;

(3) Except as provided in section 1011 of this title, the term "port of documentation" means the port at which the vessel is documented, in accordance with law;

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(4) The term "vessel of the United States" means any vessel documented under the laws of the United States and such vessel shall be held to continue to be so documented until its documents are surrendered with the approval of the Secretary of Commerce; and

(5) The term "mortgagee", in the case of a mortgage involving a trust deed and a bond issue thereunder, means the trustee designated in such deed. June 5, 1920, c. 250, § 30, Subsec. B, 41 Stat. 1000; Ex.Ord.No.6166, § 12, June 10, 1933; June 29, 1936, c. 858, Title IX, § 904, 49 Stat. 2016; 1950 Reorg. Plan No. 21, §§ 204, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1276, 1277.

RECORDING OF SALES, CONVEYANCES, AND MORTGAGES OF VESSELS OF THE UNITED STATES

§ 921. *Sale, conveyance, or mortgage of vessel of United States; record*

(a) No sale, conveyance, or mortgage which, at the time such sale, conveyance, or mortgage is made, includes a vessel of the United States, or any portion thereof, as the whole or any part of the property sold, conveyed, or mortgaged shall be valid, in respect to such vessel, against any person other than the grantor or mortgagor, his heir or devisee, and a person having actual notice thereof, until such bill of sale, conveyance, or mortgage is recorded in the office of the collector of customs of the port of documentation of such vessel, as provided in subsection (b) of this section.

(b) Such collector of customs shall record bills of sale, conveyances, and mortgages delivered to him, in the order of their reception, in books to be kept for that purpose and indexed to show—

(1) The name of the vessel;

(2) The names of the parties to the sale, conveyance, or mortgage;

(3) The time and date of reception of the instrument;

(4) The interest in the vessel so sold, conveyed, or mortgaged; and

(5) The amount and date of maturity of the mortgage. June 5, 1920, c. 250, § 30, Subsec. C, 41 Stat. 1000.

§ 922. *Preferred mortgages*

(a) A valid mortgage which at the time it is made, includes the whole of any vessel of the United States (other than a towboat, barge, scow, lighter, car float, canal boat, or tank vessel, of less than two hundred gross tons), shall, in addition, have, in respect to such vessel and as of the date of the compliance with all the provisions of this subsection, the preferred status given by the provisions of section 953 of this title, if—

(1) The mortgage is endorsed upon the vessel's documents in accordance with the provisions of this section;

(2) The mortgage is recorded as provided in section 921 of this title, together with the time and date when the mortgage is so endorsed;

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel;

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

(5) The mortgagee is a citizen of the United States and for the purposes of this section the Reconstruction Finance Corporation shall, in addition to those designated

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in sections 888 and 802 of this title, be deemed a citizen of the United States.

(b) Any mortgage which complies in respect to any vessel with the conditions enumerated in this section is hereafter in this chapter called a "preferred mortgage" as to such vessel.

(c) There shall be indorsed upon the documents of a vessel covered by a preferred mortgage—

(1) The names of the mortgagor and mortgagee;

(2) The time and date the indorsement is made;

(3) The amount and date of maturity of the mortgage; and

(4) Any amount required to be indorsed by the provisions of subsection (e) or (f) of this section.

(d) Such indorsement shall be made (1) by the collector of customs of the port of documentation of the mortgaged vessel, or (2) by the collector of customs of any port in which the vessel is found, if such collector is directed to make the indorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such indorsement is made. The collector of customs of the port of documentation shall give such direction by wire or letter at the request of the mortgagee and upon the tender of the cost of communication of such direction. Whenever any new document is issued for the vessel, such indorsement shall be transferred to and indorsed upon the new document by the collector of customs.

(e) A mortgage which includes property other than a vessel shall not be held a preferred mortgage unless the mortgage provides for the separate discharge of such property by the payment of a specified portion of the

mortgage indebtedness. If a preferred mortgage so provides for the separate discharge, the amount of the portion of such payment shall be indorsed upon the documents of the vessel.

(f) If a preferred mortgage includes more than one vessel and provides for the separate discharge of each vessel by the payment of a portion of the mortgage indebtedness, the amount of such portion of such payment shall be indorsed upon the documents of the vessel. In case such mortgage does not provide for the separate discharge of a vessel and the vessel is to be sold upon the order of a district court of the United States in a suit in rem in admiralty, the court shall determine the portion of the mortgage indebtedness increased by 20 per centum (1) which, in the opinion of the court, the approximate value of the vessel bears to the approximate value of all the vessels covered by the mortgage, and (2) upon the payment of which the vessel shall be discharged from the mortgage. June 5, 1920, c. 250, § 30, subsec. D, 41 Stat. 1000; June 27, 1935, c. 319, 49 Stat. 424.

§ 923. *Certified copies of mortgage; exhibition*

The collector of customs upon the recording of a preferred mortgage shall deliver two certified copies thereof to the mortgagor who shall place, and use due diligence to retain, one copy on board the mortgaged vessel and cause such copy and the documents of the vessel to be exhibited by the master to any person having business with the vessel, which may give rise to a maritime lien upon the vessel or to the sale, conveyance, or mortgage thereof. The master of the vessel shall, upon the request of any such person, exhibit to him the documents of the vessel

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and the copy of any preferred mortgage of the vessel placed on board thereof. June 5, 1920, c. 250, § 30, Subsec. E, 41 Stat. 1001.

§ 924. *Prior and subsequent maritime liens on mortgaged vessel*

The mortgagor (1) shall, upon request of the mortgagee, disclose in writing to him prior to the execution of any preferred mortgage, the existence of any maritime lien, prior mortgage, or other obligation or liability upon the vessel to be mortgaged, that is known to the mortgagor, and (2), without the consent of the mortgagee, shall not incur, after the execution of such mortgage and before the mortgagee has had a reasonable time in which to record the mortgage and have indorsements in respect thereto made upon the documents of the vessel, any contractual obligation creating a lien upon the vessel other than a lien for wages of stevedores when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, or for salvage, including contract salvage, in respect to the vessel. June 5, 1920, c. 250, § 30, Subsec. F, 41 Stat. 1002.

§ 925. *Record of notice of claim of lien on mortgaged vessel; discharge of lien*

(a) The collector of customs of the port of documentation shall upon the request of any person, record notice of his claim of a lien upon a vessel covered by a preferred mortgage, together with the nature, date of creation, and amount of the lien, and the name and address of the person. Any person who has caused notice of his claim of lien to be so recorded shall, upon a discharge in whole or in part of the indebtedness, forthwith file with the collector

of customs a certificate of such discharge. The collector of customs shall thereupon record the certificate.

(b) The mortgagor upon a discharge in whole or in part of the mortgage indebtedness, shall forthwith file with the collector of customs for the port of documentation of the vessel, a certificate of such discharge. Such collector of customs shall thereupon record the certificate. In case of a vessel covered by a preferred mortgage, the collector of customs at the port of documentation shall (1) indorse upon the documents of the vessel, or direct the collector of customs at any port in which the vessel is found, to so indorse, the fact of such discharge, and (2) shall deny clearance to the vessel until such indorsement is made. June 5, 1920, c. 250, § 30, Subsec. G, 41 Stat. 1002.

§ 926. *Conditions precedent to record; interest on preferred mortgage*

(a) No bill of sale, conveyance, or mortgage shall be recorded unless it states the interest of the grantor or mortgagor in the vessel, and the interest so sold, conveyed, or mortgaged.

(b) No bill of sale, conveyance, mortgage, notice of claim of lien, or certificate of discharge thereof, shall be recorded unless previously acknowledged before a notary public or other officer authorized by a law of the United States, or of a State, Territory, District, or possession thereof, to take acknowledgment of deeds.

(c) In case of a change in the port of documentation of a vessel of the United States, no bill of sale, conveyance, or mortgage shall be recorded at the new port of documentation unless there is furnished to the collector of customs of such port, together with the copy of the bill of sale, conveyance, or mortgage to be recorded, a certified copy

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of the record of the vessel at the former port of documentation furnished by the collector of such port. The collector of customs at the new port of documentation is authorized and directed to record such certified copy.

(d) A preferred mortgage may bear such rate of interest as is agreed by the parties thereto. June 5, 1920, c. 250, § 30, Subsec. H, 41 Stat. 1002.

§ 927. *Inspection of and copies from records; fees*

Each collector of customs shall permit records made under the provisions of this chapter to be inspected during office hours, under such reasonable regulations as the collector may establish. Upon the request of any person the collector of customs shall furnish him from the records of the collector's office (1) a certificate setting forth the names of the owners of any vessel, the interest held by each owner, and the material facts as to any bill of sale or conveyance of, any mortgage covering, or any lien or other incumbrance upon, a specified vessel, (2) a certified copy of any bill of sale, conveyance, mortgage, notice of claim of lien, or certificate of discharge in respect to such vessel, or (3) a certified copy as required by subsection (c) of section 926 of this title. The collector of customs shall collect a fee for any bill of sale, conveyance, or mortgage recorded, or any certificate or certified copy furnished by him, in the amount of 20 cents a folio with a minimum charge of $1. All such fees shall be covered into the Treasruy of the United States as miscellaneous receipts. June 5, 1920, c. 250, § 30, Subsec. I, 41 Stat. 1002.

PENALTIES

§ 941. *Failure of master to exhibit documents; unlawful acts by mortgagor; liability of collector of customs*

(a) If the master of the vessel willfully fails to exhibit

the documents of the vessel or the copy of any preferred mortgage thereof, as required by section 923 of this title, the Coast Guard may suspend or cancel the master's license.

(b) A mortgagor who, with intent to defraud, violates any provision of section 924 of this title, and if the mortgagor is a corporation or association, the president or other principal executive officer of the corporation or association, shall upon conviction thereof be held guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than two years, or both. The mortgaged indebtedness shall thereupon become immediately due and payable at the election of the mortgagee.

(c) If any person enters into any contract secured by, or upon the credit of, a vessel of the United States covered by a preferred mortgage, and suffers pecuniary loss by reason of the failure of the collector of customs, or any officer, employee, or agent thereof, properly to perform any duty required of the collector under the provisions of this chapter, the collector of customs shall be liable to such person for damages in the amount of such loss. If any such person is caused any such loss by reason of the failure of the mortgagor, or master of the mortgaged vessel, or any officer, employee, or agent thereof, to comply with any provision of section 923 or 924 of this title, or to file an affidavit as required by subsection (a) of section 922 of this title, correct in each particular thereof, the mortgagor shall be liable to such person for damages in the amount of such loss. The district courts of the United States are given jurisdiction (but not to the exclusion of the courts of the several States, Territories, Districts, or possessions) of suits for the recovery of such damages, irrespective of the amount

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involved in the suit or the citizenship of the parties thereto. Such suit shall be begun by personal service upon the defendant within the limits of the district. Upon judgment for the plaintiff in any such suit, the court shall include in the judgment an additional amount for costs of the action and a reasonable counsel's fee, to be fixed by the court. June 5, 1920, c. 250, § 30, Subsec. J, 41 Stat. 1003; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097.

FORECLOSURE OF PREFERRED MORTGAGES

§ 951. *Lien of preferred mortgage; foreclosure; jurisdiction; procedure; foreign ship mortgages*

A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively. In addition to any notice by publication, actual notice of the commencement of any such suit shall be given by the libellant, in such manner as the court shall direct, to (1) the master, other ranking officer, or caretaker of the vessel, and (2) any person who has recorded a notice of claim of an undischarged lien upon the vessel, as provided in section 925 of this title, unless after search by the libellant satisfactory to the court, such mortgagor, master, other ranking officer, caretaker, or claimant is not found within the United States. Failure to give notice to any such person, as required by this section, shall not constitute a jurisdictional defect; but the libellant shall be liable to such per-

son for damages in the amount of his interest in the vessel terminated by the suit. Suit in personam for the recovery of such damages may be brought in accordance with the provisions of subsection (c) of section 941 of this title.

Foreign ship mortgages: As used in sections 951-954 of this title, the term "preferred mortgage" shall include, in addition to a preferred mortgage made pursuant to the provisions of this chapter, any mortgage, hypothecation, or similar charge created as security upon any documented foreign vessel (other than a towboat, barge, scow, lighter, car float, canal boat, or tank vessel, of less than two hundred gross tons) if such mortgage, hypothecation, or similar charge has been duly and validly executed in accordance with the laws of the foreign nation under the laws of which the vessel is documented and has been duly registered in accordance with such laws in a public register either at the port of registry of the vessel or at a central office; and the term "preferred mortgage lien" shall also include the lien of such mortgage, hypothecation, or similar charge: *Provided, however,* That such "preferred mortgage lien" in the case of a foreign vessel shall also be subordinate to maritime liens for repairs, supplies, towage, use of drydock or marine railway, or other necessaries, performed or supplied in the United States. June 5, 1920, c. 250, § 30, Subsec. K, 41 Stat. 1003; June 29, 1954, c. 419, 68 Stat. 323.

§ 952. *Receiver in foreclosure; possession by marshal*

In any suit in rem in admiralty for the enforcement of the preferred mortgage lien the court may appoint a receiver and, in its discretion, authorize the receiver to operate the mortgaged vessel. The marshal may be authorized and directed by the court to take possession of the mort-

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gaged vessel notwithstanding the fact that the vessel is in the possession or under the control of any person claiming a possessory common-law lien. June 5, 1920, v. 250, § 30, Subsec. L, 41 Stat. 1004.

§ 953. *Preferred maritime lien; priorities; other liens*

(a) When used hereinafter in this chapter, the term "preferred maritime lien" means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all preexisting claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of section 952 of this title, shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court. June 5, 1920, c. 250, § 30, Subsec. M, 41 Stat. 1004.

§ 954. *Suits in personam in admiralty on default*

(a) Upon the default of any term or condition of a preferred mortgage upon a vessel, the mortgagee may, in

addition to all other remedies granted by this chapter, bring suit in personam in admiralty in a district court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel or any deficiency in the full payment thereof.

(b) This chapter shall not be construed, in the case of a mortgage covering, in addition to vessels, realty or personalty other than vessels, or both, to authorize the enforcement by suit in rem in admiralty of the rights of the mortgagee in respect to such realty or personalty other than vessels. June 5, 1920, c. 250, § 30, Subsec. N, 41 Stat. 1004.

TRANSFERS OF MORTGAGED VESSELS AND ASSIGNMENT OF VESSEL MORTGAGES

§ 961. *Surrender of documents; termination of mortgagee's interest; sale of mortgaged vessel*

(a) The documents of a vessel of the United States covered by a preferred mortgage may not be surrendered (except in the case of the forfeiture of the vessel or its sale by the order of any court of the United States or any foreign country) without the approval of the Secretary of Commerce. The Secretary shall refuse such approval unless the mortgagee consents to such surrender.

(b) The interest of the mortgagee in a vessel of the United States covered by a mortgage, shall not be terminated by the forfeiture of the vessel for a violation of any law of the United States, unless the mortgagee authorized, consented, or conspired to effect the illegal act, failure, or omission which constituted such violation.

(c) Upon the sale of any vessel of the United States covered by a preferred mortgage, by order of a district court of the United States in any suit in rem in admiralty

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for the enforcement of a maritime lien other than a preferred maritime lien, the vessel shall be sold free from all preexisting claims thereon; but the court shall, upon the request of the mortgagee, the libellant, or any intervenor, require the purchaser at such sale to give and the mortgagor to accept a new mortgage of the vessel for the balance of the term of the original mortgage. The conditions of such new mortgage shall be the same, so far as practicable, as those of the original mortgage and shall be subject to the approval of the court. If such new mortgage is given, the mortgagee shall not be paid from the proceeds of the sale and the amount payable as the purchase price shall be held diminished in the amount of the new mortgage indebtedness.

(d) No rights under a mortgage of a vessel of the United States shall be assigned to any person not a citizen of the United States without the approval of the Secretary of Commerce. Any assignment in violation of any provision of this chapter shall be void.

(e) No vessel of the United States shall be sold by order of a district court of the United States in any suit in rem in admiralty to any person not a citizen of the United States. June 5, 1920, c. 250, § 30, Subsec. O, 41 Stat. 1004; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 204, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1276, 1277.

MARITIME LIENS FOR NECESSARIES

§ 971. *Persons entitled to lien*

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any

vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel. June 5, 1920, c. 250, § 30, Subsec. P, 41 Stat. 1005.

§ 972. *Persons authorized to procure repairs, supplies, and necessaries*

The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel. June 5, 1920, c. 250, § 30, Subsec. Q, 41 Stat. 1005.

§ 973. *Notice to person furnishing repairs, supplies, and necessaries*

The officers and agents of a vessel specified in section 972 of this title shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor. June 5, 1920, c. 250, § 30, Subsec. R, 41 Stat. 1005.

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§ 974. *Waiver of right to lien*

Nothing in this chapter shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time by agreement or otherwise; and this chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States. June 5, 1920, c. 250, § 30, Subsec. S, 41 Stat. 1005.

§ 975. *State statutes superseded*

This chapter shall supersede the provisions of all State statutes conferring liens on vessels, insofar as such statutes purport to create rights of action to be enforced by suits in rem in admiralty against vessels for repairs, supplies, towage, use of dry dock or marine railway, and other necessaries. June 5, 1920, c. 250, § 30, Subsec. T, 41 Stat. 1006.

MISCELLANEOUS PROVISIONS

§ 981. *Existing mortgages not affected*

This chapter shall not apply (1) to any existing mortgage, or (2) to any mortgage hereafter placed on any vessel under an existing mortgage, on June 5, 1920, so long as such existing mortgage remains undischarged. June 5, 1920, c. 250, § 30, Subsec. U, 41 Stat. 1006.

§ 982. *Books for collectors of customs*

The Commissioner of Customs is authorized and directed to furnish collectors of customs with all necessary books and records, and with certificates of registry and of enrollment and license in such form as provides for the making of all indorsements thereon required by this chapter. June 5, 1920, c. 250, § 30, Subsec. V, 41 Stat. 1006; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097.

§ 983. *Rules and regulations by Commissioner of Customs*

The Commissioner of Customs is authorized to make such regulations in respect to the recording and indorsing of mortgages covering vessels of the United States, as he deems necessary to the efficient execution of the provisions of this chapter. June 5, 1920, c. 250, § 30, Subsec. W, 41 Stat. 1006; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097.

§ 984. *Short title*

This chapter may be cited as the "Ship Mortgage Act, 1920." June 5, 1920, c. 250, § 30, Subsec. A, 41 Stat. 1000.

APPENDIX "B"

1. DECISION BELOW IN THIS CASE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19347

IN THE MATTER OF:

WILLEM C. BARNOUW AND NANETTE E. L. MURNAN, TRUSTEES FOR BONDHOLDERS AND MORTGAGEES, AND WALL STREET TRADES, INC., BONDHOLDERS, ET AL.,

Libelants,

versus

THE S.S. OZARK, HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL, FURNITURE, ETC.,

Respondent.

Appeals from the United States District Court for the Eastern District of Texas.

(June 28, 1962)

Before TUTTLE, Chief Judge, and RIVES and BROWN, Circuit Judges.

BROWN, Circuit Judge: We deal again with the race for priority between a preferred maritime mortgage and a traditional maritime lien. This turns finally on whether an earlier mortgage was extinguished so that the subsequent mortgage must be deemed an entirely new and unrelated security subsequent in point of time to existing maritime liens. Two additional issues are presented concerning supremacy of a preferred maritime mortgage over a lien created by foreign law, and the status of claims for vacation, welfare and pension contributions as seamen's wages giving rise to a superior maritime lien. Each issue is controlled by recent decisions of this Court having immediate, specific application.

The claim of Augusta Oil Bunkering, S.P.A., for bunkers supplied to the SS OZARK involves the relative superiority of the maritime lien under Italian law and the lien of the preferred maritime mortgagee under the American Ship Mortgage Act, 1920, 46 USCA §§ 911, et seq. In a detailed opinion, this was determined adversely to the maritime lienor in *Brandon, Trustee et al. v. SS Denton*, 5 Cir., 1962, __ F. 2d __, __ AMC __ [No. 18899, Apr. 10, 1962]. We adhere to that decision and the disallowance of the claim by the District Court must be affirmed.

As to the claim for contributions due by the Vessel and her owners to various union welfare trust funds, the Commissioner (as did the District Judge affirming his report) followed a sort of middle course. While determining, as did the other Commissioners and other Courts in the related cases of the SS DENTON and the SS KINGSTON, that

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contributions to pension and welfare trust funds were not seamen's wages giving rise to a preferred maritime lien,[1] the Commissioner and the Judge below held that vacation plan contributions were. Consequently, as to this feature of the case, the mortgagee-trustee and the various trust funds each appeal and cross-appeal. Again, for the reasons spelled out in *Brandon v. SS Denton*, 5 Cir., 1962, — F. 2d —, — AMC — [No. 18899, Apr. 10, 1962], we conclude that these do not qualify as "wages of the crew of the vessel" under 46 USCA § 953 (a) (2). The allowance of a superior lien for vacation fund contributions is therefore reversed while disallowance of the pension and welfare plan funds is affirmed.

The remaining problem not covered by the SS *Denton* decision ranges all of the maritime lienors in a concerted dispute with the mortgagee-trustee of the preferred maritime mortgage. The particular preferred maritime mortgage ostensibly sought to be foreclosed was that executed June 25, 1959. Each of the competing maritime liens was for supplies furnished to the SS OZARK in the three preceding months. The Commissioner, confirmed by the District Court, held that while this was subsequent in point of time to the maritime liens, the mortgage would be superior because it was in effect a continuation (renewal) of a preferred maritime mortgage of July 1958 (or perhaps August 1957).

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[1]**The Denton**, S.D. Tex., 1960 AMC 2264, affirmed 5 Cir., 1962, — F. 2d —. — AMC — [No. 18899, Apr. 10, 1962]; **The Kingston**, S.D. Tex., 1961 AMC 1321, appealed but dismissed as settled prior to submission in this Court, Casey et al v. Meridian Trading Corp., No. 19249; **The Golden Sail**, D. Ore., 1961. 197 F. Supp. 777, and the briefs indicate two unreported decisions with like result.

As one of the difficulties encountered in the briefs and arguments is the identification of these various security instruments, we think it advisable to refer to them in terms other than the first preferred mortgage, the first second preferred mortgage, the assignment of the first second preferred mortgage by the first supplemental agreement to the second preferred mortgage, the third first preferred mortgage, or the like. So far as we are concerned, only three mortgages are involved:

The 1957 Mortgage:

Between the Shipowner and Empire Commercial Corporation securing a single promissory note $500,000 at 18% interest; maturity July 5, 1958.

The 1958 Mortgage and Assignment:

Empire Commercial Corporation assigned note and 1957 mortgage to Wall Street Traders, Inc., July 8, 1958, for $500,000 cash, the amount of unpaid mortgage debt; the separate but simultaneous First Supplemental Agreement, amended 1957 Mortgage to cover renewal note $500,000 at 16% interest, maturity July 8, 1959, and names Wall Street Traders, Inc. as mortgagee.

The 1959 Mortgage:

Between Shipowner and Barnouw and

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> Murnan, Trustees, as mortgagees; dated June 25, 1959, to secure 7 negotiable bonds shown to be issued to Wall Street Traders, Inc., or order, maturity December 31, 1959, aggregating $410,000, interest 6%.

Except for the subsidiary dispute which we later discuss concerning the sufficiency of the proof of the mortgagee's citizenship to qualify the 1957 Mortgage under § 922(a)(5), there is no doubt that the 1958 Mortgage accorded to Wall Street Traders, Inc. the status of a mortgagee of a preferred maritime mortgage having an effective date not later than July 8, 1958. Nothing about the circumstances of the assignment of the 1957 Mortgage on July 8, 1958, creates any problem. The amount then in arrears under the 1957 Mortgage was $500,000. That amount was paid in cash by Wall Street Traders, Inc. to Empire Commercial Corporation. In "extension of repayment" of the 1957 note, the shipowner issued a new note in like amount payable to Wall Street Traders, Inc. due July 8, 1959. Interest was reduced from 18% to 16%.

Of this $500,000 debt, only $140,000 was paid by the Shipowner to Wall Street Traders, Inc. at least in the sense of the receipt of cash or its equivalent. With a balance of $360,000 of that debt remaining unpaid the action was taken leading to the 1959 Mortgage and which precipitates the present controversy.

The Shipowner owed money on the SS OZARK and another vessel. It desired that the indebtedness be aggregated and then divided equally for the two vessel mortgages. Additionally, the Shipowner — presumably from

an operating point of view to bolster credit — desired that the interest nominally payable be reduced from 16% to 6%. To achieve this, the difference (10%) in the interest (approximately $35,000) was added to the principal ($360,000), and with the debt transferred from the other vessel's account, the amount secured by the 1959 Mortgage was $410,000.

Save for this possible rearrangement of interest as principal and the transfer of the small amount of the other vessel's indebtedness, Wall Street Traders, Inc. was in the same position it had been in under the 1958 Mortgage. The maritime lienors urged that five things extinguished the former security, thus creating, at best, new security which, under § 953 (a), would be outranked by maritime liens incurred prior in time.

Two of the things are emphasized most strongly. First, unlike the rearrangement of the indebtedness by the 1958 Mortgage when Wall Street Traders, Inc. took an assignment of a pre-existing mortgage which was expressly kept alive by the Supplemental Agreement, on this occasion the 1959 Mortgage—an entirely new preferred mortgage—was executed on June 24, 1959. It made no reference to the 1958 Mortgage or the earlier 1957 Mortgage, or the Supplemental Agreement. Second, and more important, in connection with the required filing of it in the Customs House, there was also filed a formal "Satisfaction of Mortgage" on Customs Form 1363.[2] After referring to

[2]The Customs Regulations provide that:

"(h) Each certificate of discharge of mortgage presented for recording shall be on the customs Form 1363 or in a substantially similar form." 19 C.F.R. § 3.33 (h). And see 19 C.F.R. § 3.38 (i); 46 USCA § 925 (b).

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the 1957 and 1958 Mortgages, this paper, executed by Wall Street Traders, Inc. under oath, recited that the 1957 preferred Mortgage "is paid, and [the mortgagee] does consent that the same be discharged of record." The other differences urged include, as third, the change in interest rate, as the fourth, the change in principal, and fifth, the change in parties. This latter (fifth) difference arose from the mandatory use of trustees as mortgagees since the debt was represented by negotiable bonds.[3]

The argument of the lienors has a beguiling appeal. It is premised on what the Customs House records reflect to one making inquiry of the state of the vessel's title. Thus, the argument runs, there can be no stability to, nor reliance on, the vessel ownership records if a new instrument between different parties created at a fixed time is deemed to be merely the continuation of a pre-existing security which is formally extinguished on the record. But this is to argue backwards. For with the supplies giving rise to the maritime lien furnished prior in time to the last recorded mortgage complained of, the public record could not have misled anyone because there could be no reliance on a mortgage not yet executed or recorded. Whatever merit this basic contention has is not really related to the apparent state of the vessel's record title. Rather, as to maritime liens coming into being prior to the time of the recorded document in dispute, it is a question whether the security formerly existing has been legally extinguished. If it has, then those maritime liens which arose from the act of furnishing the supplies to the vessel are freed of the

[3] 46 USCA § 911 (5): "The term 'mortgagee', in the case of a mortgage involving a trust deed and a bond issue thereunder, means the trustee designated in such deed." and see 19 C.F.R. § 3.1 (f).

obstacle to effective enforcement arising from the statutory priority accorded to the preferred maritime mortgage. This, of course, cuts both ways and is certainly a relevant factor in determining whether any such awesome consequences were intended by the filing of the subsequent instrument.

Whether the subsequent transaction between the same parties has that effect is, as we held just recently in *Merchants & Marine Bank v. The T. E. Welles*, 5 Cir., 1961, 289 F. 2d 188, ___ AMC ___, a matter of the intention of the parties to that transaction.[4] After emphasizing the necessity that Courts attempt to give preferred ship mortgages a marketability consistent with usual mortgage principles, we had this to say. "The accepted rule is that unless a contrary intention of the parties clearly appears, the execution and delivery of a new mortgage in renewal of a former one, even though accompanied by a formal satisfaction and discharge of the initial mortgage, does not have the effect of extinguishing the priority which the initial mortgage carries. The subsequent mortgage given in renewal is prior to liens which arose or would otherwise have come into being during the period of the initial mortgage." 289 F. 2d 188 at 194. See also 5 Tiffany, Real Property § 1487 (3rd ed. 1939).

The lienors do not really challenge this holding or seek to have us modify it in any way. They do, however, insist that the facts here are at substantial variance with those which we there characterized as showing that the "security was

[4]Neither in that case nor here have we dealt with the priority status or rights of a lienor furnishing supplies, etc. to the vesel subsequent to the record document in controversy.

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the same, the parties were the same, [and] the debt was substantially the same." 289 F. 2d 188, 193.

We cannot agree. We start first with the debt itself. At the time of the rearrangement by the 1959 Mortgage, Wall Street Traders, Inc. was still out $360,000. At least to this extent there was no advance of new credit or cash.[5] This assumes, of course, that the parties were the same. In fact there can be no doubt. The Shipowner as debtor was the same and the creditor was still Wall Street Traders, Inc. The only difference was that instead of being the holder of a single promissory note, it now became the named payee in 7 negotiable bonds. Nor, as to this, was there any hiatus in the record title since the 1959 Mortgage from the Shipowner to the trustee referred expressly to the bonds and to the annexed copy of a typical bond showing that it was issued to Wall Street Traders, Inc. or order. Whatever might be the ultimate priority of amounts in excess of the remaining balance,[6] see note 5, supra, the increase in the face amount of the mortgage debt was not such as to compel a conclusion that it was an entirely new debt and security independent of the previous mortgage. So far as interest was concerned, there was in fact no real change since the prin-

[5]Neither in Merchants & Marine Bank v. The T. E. Welles, supra, nor here, have we yet determined that the continuation of the prior mortgage security extends beyond the balance remaining due at the time of the implied renewal (here $360,000). We reserve decision on that as well as the analogous problem growing out of subsequent further reduction in the balance as of the time of renewal followed by later increases or other fluctuations. In other words, our decision so far grants protection to the mortgagee only to the extent of the original debt remaining at the time of the subsequent renewal.

[6]It is academic here as the balance of the original debt ($360,000) exceeded the amount ($245,000) for which the SS OZARK was sold by the Marshal in these proceedings.

cipal was increased to offset the lower rate. To the extent that this was to be determined by what appeared from the documents, the reduction in the interest charge was perfectly consistent with accepted commercial business practices in the extension or rearrangement of indebtedness. Whatever the consequence of the increase in the debt, or the change in the interest rate, it is uncontradicted that for an amount way in excess of the proceeds from the Marshal's sale of the vessel, the former debt continued unpaid. This brings into play the proposition that "so long as the same debt or some part of it subsists, the presumption ordinarily is that the new mortgage is intended as a renewal of the old, and the continuation of the same security." *Jones v. Curtiss*, Wash. S. Ct., 1944, — Wash. —, 147 P. 2d 912, 921.

As we regard these asserted differences of no real consequence, the attack reduces itself to the formal satisfaction and Discharge of the 1958 Mortgage executed and filed on the Customs form by Wall Street Traders, Inc., the creditor. This was, of course, the very situation presented in *The T. E. Welles*. Here, as there, the formal paper purported to show the debt discharged and paid in full. But here, as there, the papers were filed simultaneously as parts of a single continuous transaction revealing the existence of a debt not less than the prior balance and reserving the fullest security which the parties by contract might obtain. One was no more important than the other. None would have been filed alone or without the others. It is, of course, entirely possible that parties knowingly could relinquish security then held. But on this record which contains only the documents and the uncontradicted testimony of the President of the creditor that the 1959 bonds and Mortgage

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were in renewal of the existing debt, we can certainly not hold as a matter of law that Wall Street Traders, Inc. purposefully intended to forego its standing as a preferred maritime mortgagee. In some circumstances the law might attach such consequences to the acts of the parties. But, as we pointed out in the *T. E. Welles,* to ascribe such consequences to the *intention* would, defying reason, "be contrary to everything which both parties had in mind * * *." 289 F. 2d 188, 194.

The result is that by operation of law and the intention of the parties, the 1959 Mortgage carried with it the 1958 Mortgage and the 1957 Mortgage as well.[7] All three were therefore in effect foreclosed simultaneously. Consequently, we must consider the subsidiary contentions that the 1957 Mortgage was not in issue or in evidence. We have examined the record including the briefs and memoranda filed before the Commissioner as well as his very extensive report. Each of the mortgage documents was received and marked in evidence. The memoranda of the parties and the Commissioner's decision discussed these documents pro and con in the very context of renewal, continuation, or extinguishment of security. Moreover, the Abstract of Title of the vessel on Customs Form 1332 was in evidence and showed each of these transactions. The proceedings before

[7]As an additional argument some appellants point to the following cases in urging that there was a novation in this case. Cardwell Investment Co. v. United Supply & Mfg. Co., 10 Cir., 1959, 268 F. 2d 857; Gulf Oil Corp. v. Texas City Refining, 4 Cir., 1954, 218 F. 2d 196; Guerra v. American Colonial Bank, 1 Cir., 1927, 21 F. 2d 56, cert. den. 275 U.S. 567, 48 S.Ct. 140, 72 L.Ed. 430; Barbano v. Central-Hudson Steamboat Co., 2 Cir., 1931, 47 F. 2d 160. We do not regard any of them as controlling in this case.

the Commissioner were, as might be expected, on a fluid and flexibly informal basis. Everyone was given an adequate opportunity for offering testimony either in support or refutation of a claim or that of any of the intervenors. Until the briefs before this Court, no one either challenged the existence of the 1957 Mortgage, the 1958 Mortgage, or the qualification of either as preferred mortgages under the law.

So far as proof of citizenship was concerned, we think that under these circumstances there was a prima facie case made out. Empire Commercial Corporation was shown in the documents to have been a New York corporation. Moreover, under the statutes regulating the transfer of American vessels, 46 USCA § 838, and the Custom regulation 19 C.F.R. § 3.33 (a); § 3.37, 46 USCA § 922 (a) (5), the mortgagee had to file an oath of citizenship before the Customs office could receive, file or endorse the 1957 Mortgage on the ship's documents. With the known emphasis of Customs officials on citizenship in relation to American vessels, we think that if there was any basis for contending that the mortgage was not qualified for want of citizenship of the mortgagee, it was up to the lienors to bring forth the evidence. This was all an afterthought.

The result is that the preferred maritime mortgage has priority in payment to the maritime liens of the suppliers.

AFFIRMED IN PART, REVERSED AND RENDERED IN PART.

2. JUDGMENT BELOW IN THIS CASE

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1961

No. 19,347

D. C. Docket Nos. 678 Admiralty Consolidated

IN THE MATTER OF:

WILLEM C. BARNOUW AND NANETTE E. L. MURNAN, TRUSTEES FOR BONDHOLDERS AND MORTGAGEES, AND WALL STREET TRADERS, INC., BONDHOLDERS, ET AL., Libelants

versus

THE S.S. OZARK, HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL, FURNITURE, ETC., Respondents

Appeals from the United States District Court for the Eastern District of Texas

Before Tuttle, Chief Judge, and Rives and Brown, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the final decree of the said District Court in this cause be, and the

same is hereby, affirmed in part and reversed and rendered in part in accordance with the opinion of this Court.

Issued:

June 28, 1962

3. ORDER BELOW DENYING REHEARING IN THIS CASE.

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 19,347

IN THE MATTER OF:
WILLEM C. BARNOUW AND NANETTE E. L. MURNAN, TRUSTEES FOR BONDHOLDERS AND MORTGAGEES, AND WALL STREET TRADERS, INC., BONDHOLDERS, ET AL., Libelants

vs.

THE S.S. OZARK, HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL, FURNITURE, ETC., Respondent

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Appeals from the United States District Court for the Eastern District of Texas

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(July 26, 1962)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, and RIVES and BROWN, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.

4. DECISION BELOW IN PRIOR CASE DEEMED CONTROLLING IN THIS CASE BY THE COURT OF APPEALS.

In the
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 18413

MERCHANTS & MARINE BANK,
Appellant,

versus

THE Fishing Vessel T. E. WELLES, etc.,
Appellee,

April 12, 1961

Before TUTTLE, Chief Judge, and BROWN and WISDOM, Circuit Judges.

JOHN R. BROWN, Circuit Judge.

We deal with this case for a second time. As before it presents questions of priority of general maritime liens for supplies in opposition to that of a preferred ship mortgage. Laches was, or was thought to be, the important question.

On its first appearance, Pascagoula Dock Station v. Merchants and Marine Bank, 5 Cir., 1959, 271 F. 2d 53, 1959 A.M.C. 2207, we did two things. First, we upheld the validity of the preferred ship mortgage of March 29, 1957. Second, we concluded that the District Judge's initial holding that the maritime lienor, Pascagoula Dock Station, was guilty of delay injurious to the interest of the Bank, but

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not of laches was intrinsically contradictory. Consequently, we remanded the cause for further proceedings. Our conclusions were summed up this way. "Did the Judge mean delay only or laches as that term is ordinarily understood? The legal consequences * * * turn on this fact-legal conclusion. * * * For instance, if on the remand which we order the Judge adheres to his conclusion that there was *delay* but no laches, then the decree to be entered must be in favor of the maritime lien ($1,282.12) as superior to the mortgage. Section 953(b), (46 U.S.C.A. § 953) expressly accords priority to 'preferred maritime liens' which this would then be since it would be unaffected by laches (46 U.S.C.A. § 974(2)) found not to exist." 271 F. 2d at pages 57-58.

On that retrial based largely on the original record save for one new fact which we regard finally as decisive, the Trial Court adhered to the prior conclusion, this time expressed unequivocally, that the lienor was not guilty of laches. Giving literal application, as he was most certainly entitled to do, to our direction dependent upon the specific fact finding, the Judge then held for the lienor and against the Bank. It is the Bank, the mortgagee under the preferred ship mortgage, which now appeals.

Amplifying the same arguments it offered previously in support of the Trial Court's then decision of priority of the mortgage over the maritime liens, the Bank renews the contention that the supplier's lien was extinguished or reduced in priority by laches. Its task on that score has now become more difficult since it is faced with the formidable prospect of overturning fact findings as clearly erroneous. *O/Y Finlayson-Forssa A/B v. Pan Atlantic S. S. Corp.*, 5 Cir., 1958, 259 F. 2d 11, 13, 1958 A.M.C. 2070, 2072; *Mississippi Shipping Co. v. Zander & Co.*, 5 Cir.,

1959, 270 F. 2d 345, 347, 1959 A.M.C. 2143, 2145, 273 F. 2d 618, 1960 A.M.C. 247. A finding of laches is compelled, the Bank insists, either on the analogy of the Mississippi state statute of limitation, here claimed to be six months,[1] or on general principles of maritime law apart from state statutes.[2]

Either alone, or as an ingredient of laches, the Bank asserts also that, as a matter of law, the lienor failed to exercise reasonable diligence since it never at any time either made inquiry at the Collector of Customs office concerning the existence of any preferred ship mortgage or, worse, recorded a notice of its maritime liens as the statute permits.

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[1]Miss. Code § 340 (1942). This statute, and some of the supremacy or supersession problems engendered by it are set out in note 3, 271 F. 2d 53, at page 57.

[2]The Bank cites the following as a partial tabulation of cases showing delays which have been held excessive: The Eliza Jane, D. C. Mass. 1847, Fed. Cas. No. 4,363, 6 months; The Jasper, C. C. Mass. 1872, Fed. Cas. No. 17,898, 10 months; The Lyndhurst, D.C.N.Y. 1892, 48 F. 839, one year; The Algonquin, D.C.N.Y. 1898, 88 F. 318, 7 months; Norfolk Sand & Cement Co. v. Owen, 4 Cir., 1902, 115 F. 778, 14 to 15 months; The Boise Penrose, D.C.N.Y. 1926, 15 F. 2d 70, 1926 A.M.C. 1247, 2 years; The Grace Darling, D.C. Mass. 1927, 18 F. 2d 587, 1927 A.M.C. 757, 15 months; Gray v. Hopkins-Carter Hardware Co., 5 Cir., 1929, 32 F. 2d 876, 1929 A.M.C. 875, 2 years; The Everosa, 1 Cir., 1937, 93 F. 2d 732, 1938 A.M.C. 82, 1 year; Phelps v. The Cecelia Ann, 4 Cir., 1952, 199 F. 2d 627, 1952 A.M.C. 1968, 2 years; The J. R. Hardee,D.C.S.D. Tex. 1952, 107 F. Supp. 379, 1952 A.M.C. 1124, less than 2 years from beginning of account, less than 1 year from last item; National Shawmut Bank of Boston v. The Winthrop, D.C.D. Mass. 1955, 134 F. Supp. 370, 1955 A.M.C. 2089, 10 months from last item of account.

46 U.S.C.A. § 925(a).[3] See Gilmore & Black, The Law of Admiralty § 9-72 at 616 (1957). Here the Bank relies heavily on *The John Cadwalader (Kensington Shipyard & Drydock Corp. v. Philadelphia National Bank)* 3 Cir., 1938, 99 F. 2d 678, 1939 A.M.C. 52.

Of course, as a part of this claim of non-diligence, the Bank lays itself open to like attack. But to the supplier's contention that the Bank failed to make adequate inquiry concerning the existence of outstanding debts, claims or liens, Bank counters that it satisfied all such obligations imposed either expressly or impliedly under the Ship Mortgage Act, 46 U.S.C.A. §§ 911-984, by obtaining and filing the mortgagor's affidavit of good faith, 46 U.S.C.A. § 922(a)(3). That, it contends, is to be deemed the equivalent of specific inquiry for facts—notwithstanding that it is stated as legal conclusion[4]—as to the borrower's financial situation. Refuting this, the supplier has powerful support both on general principles and the precision with which the Act gives the lender a positive right to a full and fair disclosure and compels honest, complete answers under severe criminal

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[3]It should be pointed out that the duty of the Collector of Customs to "record notice of [any person's] claim of a lien" relates only to "a vessel covered by a preferred mortgage," 46 U.S.C.A. § 925 (a). There is no place to file notice of such claims beforehand. The Customs Regulations make no provisions for using the Collector's office as the repository for general information somewhat like the courthouse door. 19 CFR 3.38 (g). A principal purpose is to afford maritime lienors protection in the event of foreclosure of the preferred ship mortgage, see, e.g., §§ 951, 961.

[4]The statue requires "An affidavit * * to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel." 46 U.S.C.A. § 922(a) (3).

sanctions. §§ 924 and 941(b).

Recognizing that a plea of laches is more than time, the Bank undertook to establish detriment. It did this both as to the time of making of the original loan, and later on in 1958 when it released another vessel. The M/V Glenn and Kay, from a simultaneous preferred ship mortgage securing the common debt in order to permit her to be sold without requiring application of the full proceeds of the sale to reduce the debt. See 271 F. 2d 53, 55.

And all the while there was, on any supposition or holding of laches as to the maritime liens in competition with a preferred ship mortgage, lurking many intriguing and intricate questions. This would include the effect of laches and whether it extinguishes the *in rem* lien altogether leaving only rights *in personam* for the remainder of the stated statutory period of limitations on a contract action. See Gilmore & Black, The Law of Admiralty §§ 9-77 through 9-84 at 624-40 (1957). Some have pointed out "that the issue of laches is gone into only on the problem whether or not there *is* a lien. If the question is as to the priority of liens among themselves, laches does not defeat priority." Robinson, Admiralty § 55 at 398-99 (1939). Although we do not undertake to decide the point, Judge Hough was quite positive. "Laches is a defense, and if successful, it defeats the claim advanced by plaintiff or libellant." The Oregon, 2 Cir., 1925, 6 F. 2d 968, 969, 1925 A.M.C. 1271. This might have particular importance here since the contest is between a preferred ship mortgage and a maritime lien. Section 974 of the Maritime Lien Act does declare that it shall not affect the "rules of law existing on June 5, 1920, in regard to * * * (2) laches in the enforcement of liens upon vessels, * *." Hence the Bank recognizes in

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its brief that if, somewhat as was done in *Burdine v. Walden*, 5 Cir., 1937, 91 F. 2d 321, 1937 A.M.C. 1149 where effect was given to a state statute, the Court were to adjudge that the supplier's lien was stale and therefore unenforceable because of laches from failure to commence judicial proceedings within six months as § 340 of the Mississippi Code, note 1, supra requires, there would then be the none too easy task of determining whether to approve the doctrine of The Owyhee,[5] 2 Cir., 1933, 66 F. 2d

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[5]This case held that a State (New York) limitation (12 months) for maritime liens constitutes laches by analogy in spite of Section 975 which superseded state laws.

46 U.S.C.A. § 975 provides:

"This chapter shall supersede the provisions of all State statutes conferring liens on vessels, insofar as such statutes purport to create rights of action to be enforced by suits in rem in admiralty against vessels for repairs, supplies, towage, use of dry dock or marine railway, and other necessaries."

The Owyhee, and its progenitors, Nolte v. Hudson Navigation Co., 2 Cir., 1924, 297 F. 758, 1924 A.M.C. 276, and The Portchester, 2 Cir., 1932, 56 F. 2d 579, 1932 A.M.C. 414, have been severely criticized because the decisions seemed to be a curious transfusion of life into state statutes in the face of comprehensive legislation designed to overcome the bewildering complexities of the old half-Federal half-State structure. See Benedict, Admiralty 299-300 (6th ed. 1940) and note 37, quoting Benedict, § 466 (5th ed. 1924); Robinson Admiralty § 55 at 398 (1939); Gilmore & Black, Admiralty 628-30 (1957). We voiced an express disapproval of Nolte. We declared that the purpose of the Maritime Lien Act "was to substitute a 'single federal statute for the state statutes insofar as they confer liens for repairs, supplies and other necessaries,'" and declared that Section 947 "of that act, did not abolish, but continued in force, the rules of admiralty law in regard to laches announced in the Key City, 14 Wall. 653, 20 L.Ed. 896, under which courts of admiralty are not governed by any statute of limitations, recognie no arbitrary or fixed period of time within which suits may be brought, but apply the equitable doctrine of laches to the peculiar circumstances of each

399, 1933 A.M.C. 1185, and thus cut off the priority given by § 953[6] to pre-mortgage preferred maritime liens. If deemed a question of priority, not the more decisive one off continued existence of the lien as such, there would be the further problem of the general pre-1920 law and the impact, if any, of state law since the pre-existing law was continued only as to "(5) priorities between maritime liens and mortgages, *other than preferred mortgages*, * * *." § 974[7] (Emphasis supplied.)

case." The Gertrude, 5 Cir., 1930, 38 F. 2d 946, 948, 1930 A.M.C. 823.

The problem would also include that of determining whether, apart from the Owyhee type laches through operation of state statutes of limitation as an analogy, actual laches would cut off the Section 953 statutory priority of a preferred maritime lien. Judge Aldrich so held, but tested laches as of the date of the recording of the mortgage, not for delay by the maritime lienors in commencement of proceedings subsequent to the mortgage. National Shawmut Bank of Boston v. The Winthrop, D.C.D. Mass. 1955, 134 F. Supp. 370, 1955 A.M.C. 2089, and D.C., 129 F. Supp. 661, 1955 A.M.C. 1288. Judge Allred, in his celebrated opinion on tax liens. The J. R. Hardee, D.C.S.D. Tex. 1952, 107 F. Supp. 379, 1952 A.M.C. 1124, likewise applied actual laches apparently based on the lienor's delay in enforcement proceedings before and after recordation of the mortgage. And see Gilmore & Black, Admiralty 614-15, 637-39 (1957).

Obviously we do not undertake to decide these questions now.

[6]Section 953 provides:

"(a) When used hereinafter in this chapter, the term 'preferred maritime lien' means (1) a lien arising prior in time to the recording and endorsement of a preferred mortgage in accordance with the provisions of this chapter; * * *.

"(b) * * * except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed by the court." 46 U.S.C.A. § 953.

[7]"* * * this chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among

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But all of this was on the supposition that, as tried below the first time and determined here on the first appeal, the mortgage we were concerned with was that of March 29, 1957. It was on this point that the trial on remand was so decisive. For now it appears without contradiction that the mortgage of March 29, 1957, was in reality a renewal of an earlier preferred ship mortgage of March 9, 1956.

The probable legal significance of that event is forecast by the entirely different color it throws upon the facts of the supplier's claim. Whereas all thought that the question related to priority of $1282.12 for supplies furnished *prior* to the mortgage, it now turns out that only $40.58 predated the initial mortgage of March 9, 1956.[8]

This newly discovered event[9] now calls for a change of course. The legal questions are changed to these. Was this initial[10] mortgage valid as a preferred ship mortgage? What was the status of maritime liens for supplies furnished in

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themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States." 46 U.S.C.A. § 974.

[8]The itemized claim covering credit (not cash) deliveries began March 8, 1956 for $40.58. The next delivery was March 11, 1956, two days after the initial mortgage. The last purchase preceding the subsequent mortgage of March 29, 1957, was on March 17, 1957. The balance outstanding at the moment of that mortgage was $1282.12. The remainder of the claim for deliveries from March 30, 1957 through February 16, 1958 was adjudicated to be subordinate to the preferred ship mortgage. 271 F. 2d 53, 56.

[9]Of course it is not a discovery. It is something the Bank knew although presumably its proctors were unaware of it. There is not the faintest breath of suspicion that there was any connivance or lack of good faith in this mistake.

[10]We use this in lieu of "first" to avoid confusion with the common security situation of a first and second mortgage. Likewise, the mortgage of March 29, 1957, is referred to as "subsequent."

the period March 9, 1956 to March 29, 1957? What, if anything, happened to that status when the initial mortgage was replaced by the subsequent one—did that which was subordinate now become superior?

The first is readily disposed of. This initial mortgage complied with the statute, was properly filed with supporting affidavit of good faith, recorded and noted on the ship papers. By the express terms of the statute, that made it superior to all liens of every kind and character thereafter incurred save liens for crews' wages, general average, salvage and tort claims. 46 U.S.C.A. § 953(a). At that point laches by the supplier is wholly irrelevant. The statute fixed the priority in favor of the mortgagee. Of course the Ship Mortgage Act does not outlaw maritime liens, it merely subordinates them. Consequently, all of these supplies when and as furnished gave rise to valid maritime liens. They were in existence. The mortgage did not, as such, extinguish them. They would, subject to laches or relative priority ranking among other maritime liens, continue. To the extent of any surplus remaining after satisfaction of the preferred ship mortgage debt, such liens would participate in the distribution. § 953(b). See also § 961(c) and Gilmore & Black, The Law of Admiralty § 9-54 at 587 (1957). And if the mortgage debt has been voluntarily paid in full, such liens which had thus come into being from the moment of furnishing the supplies would thereupon have the vitality which the Maritime Lien Act and general maritime law would accord them.

That means that the crucial question is the legal significance of the execution and recording of the subsequent mortgage as a renewal of the initial one. Was the superior lien of the initial mortgage extinguished? With the statu-

tory impediment evaporated, did the traditional maritime liens now flower into full bloom? Did the subsequent mortgage come into being as a security subject to outstanding valid maritime liens prior in time and hence in right (unless thereafter extinguished or subordinated by laches)? Did it begin its life with a congenital infirmity?

The facts which are significant are few and undisputed. The initial mortgage was to secure a note for $12,000. The balance due at the time of the subsequent mortgage, March 29, 1957, was $7,771.50. At that time the Bank agreed to loan an additional $4,000 for which, after some minor adjustments, the vessel owners were to, and did, execute a new note for $11,500. The parties to this transaction were the owners of the two vessels and the Bank. The purpose or intention of no other party is relevant. For the new advance and for the remaining balance still due on the initial loan, the owners intended to offer, and the Bank expected to obtain, a preferred ship mortgage. The mechanics to effect this additional advance with preferred security were these. On March 29, 1957, a new note was executed in the sum of $11,500. Simultaneously, the Bank executed a formal satisfaction of the initial mortgage on the Customs House form and the owners, as mortgagors, executed a new preferred ship mortgage. The new (subsequent) mortgage and the satisfaction of the original (initial) mortgage were filed simultaneously with the required documents at the Customs House on April 4, 1957. The security was the same, the parties were the same, the debt was substantially the same.

In this situation we think every consideration leads to the application of generally well-accepted legal principles concerning mortgages. The passage of the Ship Mortgage

Act came about primarily from the necessity of affording substantial security to persons supplying essential financing to the shipping industry. 1 Benedict, Admiralty § 78 at 181 (1940); Gilmore & Black, The Law of Admiralty § 9-48 at 570, and see § 9-49 through 9-51. With all of its statutory protections, it still has infirmities in contrast to land-based securities[11] Nevertheless, the statute overcomes the basic weakness that a ship mortgage was a non-maritime contract presenting difficult, if not impossible, procedural problems in effectual enforcement and substantively was subject all the while to the maritime liens of ship suppliers. Benedict, supra § 77 at 162; Gilmore & Black, supra § 9-47 at 568. Since the aim was to afford as substantial protection to lenders as the peculiar nature of maritime operations would permit, the approach ought to be one of harmony with usual security principles.

The accepted rule is that unless a contrary intention of the parties clearly appears, the execution and delivery of a new mortgage in renewal of a former one, even though accompanied by a formal satisfaction and discharge of the initial mortgage, does not have the effect of extinguishing the priority which the initial mortgage carries. The subsequent mortgage given in renewal is prior to liens which arose or would otherwise have come into being during the period of the initial mortgage. 36 Am. Jur. Mortgages §§ 458, 457, 459. A comprehensive annotation states that it is the general rule that "where the holder of a senior mortgage discharges it of record, and contempora-

[11]Liens arising from claims for crews' wages, salvage, general average and damages for torts, e.g., personal injury, death, collision, fire, cargo damage, are all superior. 46 U.S.C.A. § 953(a). Insurance, if maintained, collectible and adequate in coverage, may fill some of the gaps.

neously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien unless the circumstances of the transaction indicate this to have been his intention * * *." 33 A.L.R. 149; see also The Bergen, 9 Cir., 1933, 64 F. 2d 877, at pages 880-881. This is especially so where the junior lien came into being (as here) during the currency of the prior mortgage, so that attributing to the renewal mortgage the priority of the initial one leaves the junior lienor in exactly the same position had no renewal mortgage been executed. 33 A.L.R. 149, 162-165; supplemented in 98 A.L.R. 843.

It is undisputed that at the time the subsequent note and mortgage were executed, nearly $8,000 remained due on the initial note and mortgage. The debt was not paid off at the time. No funds were advanced with which to pay it off. The money advanced was confined to the additional $4,000. It would be contrary to everything which both parties had in mind for a court to conclude that it was the purpose of the Bank to relinquish the preferred status which it had by virtue of the initial mortgage and rely altogether on a new security then to be obtained. The new security would inescapably be exposed to the substantial perils of the sea—here the awesome nature of the pervasive, ofttimes secret, maritime liens, whose priority is expressly recognized in § 953(a) (1). If that were to occur there would have to be a moment—invisible, unmeasurable, undiscernible—just after the former ceased to exist and immediately before the subsequent came into being. At that moment what was formerly inferior would now, as the sole lien, become superior. To import into the maritime finance security field any such

metaphysics would be more than personifying a vessel and a lien. The lien would not only be, in Holmes' words, a "brooding omnipresence," it would ripen suddenly into a superior right without any purposeful action having a relation to the practical needs of ship suppliers, vessel operations or ship mortgages.

Thus after two trials and two appeals, the case approaches an end. All there is left is the item of $40.58 for the first supplies furnished on March 8, 1956. Literally, we could say that when the District Court declared no laches, this small item was included. We think it would be inappropriate to refer the whole matter back over the small item. Taking into account all that both records and findings teach, we are satisfied that had this been the only item the Judge would have concluded that failure to assert this claim for over two and one-third years in the face of two preferred ship mortgages has extinguished whatever lien there might once have been.

Reversed and rendered.